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No. 90-255

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

NEW YORK TELEPHONE COMPANY and
ROCHESTER GAS AND ELECTRIC CORPORATION,

Petitioners,

v.

JOSEPH CAHILL and
ROBERT ABRAMS, ATTORNEY GENERAL OF THE
STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The New York Public Service Commission ("PSC") is charged with plenary regulatory and rate-fixing powers over all public utilities in New York State. (A2)* N.Y. Public Service Law §§ 66 (12), 91(1), 97(1). The PSC has the exclusive authority to determine just and reasonable rates, and no utility may charge more or less than the rates established by the PSC. (A33) Until 1970, the PSC did not allow utilities to recoup from ratepayers the cost of their charitable contributions. (A2) In 1970, the PSC reversed its previous policy, explaining its decision as one intended to

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* Citations in this form are to the Appendix to the Petition for Writ of Certiorari.

benefit charities:

> Most charities could not function were it not for corporate contributions, and the corporations themselves, recognizing their role in the communities in which they operate and their public interest obligations to these communities, have supplied charities with a large share of the funds needed to carry on their necessary community activities.

N.Y. Telephone Case, #25155 (1970) (A67-68). In keeping with the 1970 policy, the PSC had, until recently, permitted New York utilities to recoup from their ratepayers contributions to politically active organizations devoted exclusively to social, political and economic change, such as the National Organization for Women Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the American Jewish Congress, One Hundred Black Men, National Urban League and

the NAACP of Yonkers (JA 706-07)*; churches (JA 469, 693); a range of church-related institutions in many states outside of New York (JA 696-99); institutions apparently primarily for the purpose of promoting religion, such as Religion in American Life Inc. and the Council of Churches of the City of New York (JA 707); the arts and culture (JA 469-71, 701); and public broadcasters, including Institutional Television of the Archdiocese of New York (JA 700) and the Diocese of Rockville Educational Television (JA 704).

Petitioners do not dispute that, under the PSC policy, they had charged ratepayers for charitable contributions to institutions that

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* Citations in this form are to the Joint Appendix filed below in the New York State Court of Appeals.

perform abortions and support the right to abortion. (JA 540-41)

The courts of numerous states have long held that the cost of charitable contributions of regulated utility monopolies cannot lawfully be charged to utility ratepayers, but must be borne by the utility stockholders. See, e.g., Cleveland Elec. Illuminating Co. v. PUC of Ohio, 69 Ohio 2d 258, 431 N.E.2d 683 (Ohio S.Ct. 1982); Southern Bell Tel. & Tel. Co. v. Florida PSC, 443 So.2d 92 (Fla. S.Ct. 1983); Mississippi ex rel. Alain v. Mississippi PSC, 435 So.2d 608 (Miss. S.Ct. 1983); Davenport Water Co. v. Iowa State Commerce Comm'n, 190 N.W.2d 583 (Iowa S.Ct. 1971); Jewell v. Washington UTC, 585 P.2d 1167 (Wash. S.Ct. 1978); Pacific Tel. & Tel. Co. v.

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Tel. Co. v. PSC, 187 A.2d 475 (Ct. App. Md. 1963); Washington Gas Light Co. v. PSC, 450 A.2d 1187 (Ct. App. D.C. 1982); Re Mountain States Tel. & Tel. Co., 78 P.U.R.3d 429 (Utah PSC 1969); Re Southern New England Tel. Co., 78 P.U.R.3d 504 (Conn. PUC 1969); Re Mountain States Tel & Tel. Co., 22 P.U.R.4th 516 (Col. PSC 1977).*

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* Petitioners contend that 22 states allow the charitable contributions of utilities to be included in the charges to ratepayers. (Pet. at 2). That claim is misleading. At least four of the decisions cited by petitioners (at 2 n.1) actually hold the opposite, disallowing the inclusion of charitable contributions, either under all circumstances, Re Mountain States Tel. & Tel. Co., 22 P.U.R. 4th 516 (Colo. PUC 1977); Re Iowa Power & Light Co., 6 P.U.R.4th 446 (Iowa PUC 1974); or under almost all

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Respondent Joseph Cahill is a practicing Roman Catholic who has lived in the Town of Fishkill, N.Y. for over twenty-five years. (JA 84) He is a

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circumstances, Boston Gas v. Dep't of Public Utilities, 539 N.E.2d 1001 (Mass. 1989) (disallowing contributions unless they provide "direct or essential benefit to ratepayers"; benefit to service area insufficient); New Jersey Bell Tel. Co. v. Dep't of Public Utilities, 97 A.2d 602 (1953) (disallowing contributions unless "reasonably necessary in the rendition of service to the consumer"; commission must examine relationship of each contribution to the "functional operation of the company").

Moreover, most of the remaining decisions cited by petitioners are by state public service commissions, not by courts. As the cases cited in the text above, most of which are by the highest court of a state, make clear, the vast majority of state courts to have considered the question have rejected efforts to charge ratepayers for the charitable contributions of monopoly utilities.

customer of petitioner New York Telephone Company ("N.Y. Telephone") and of Central Hudson Gas & Electric Corporation ("Central Hudson"), a former intervenor in this case that has abandoned its appeal. (A3, JA 149, JA 65)

Cahill commenced this proceeding against the PSC in the New York State Supreme Court challenging as violative of the First Amendment the PSC policy under which he, as a ratepayer, was forced to fund (1) organizations engaged in activities and causes contrary to his political and personal beliefs; (2) religious institutions that expound beliefs inconsistent with his own; and (3) organizations that promote the right to abortion, to which he is opposed on moral and religious grounds. (A3) The PSC and certain utilities that were

added as parties moved to dismiss the action on the ground that state action was not present, and after their motion was denied by the trial court (A54-60), the Appellate Division (A45-49), and the Court of Appeals (A28-36), this Court denied certiorari. 494 U.S. 829 (1987).

Subsequently, the Attorney General of the State of New York commenced a separate action challenging the PSC's charitable contribution recoupment policy under the First Amendment, and that action was consolidated with Cahill's. (A3) On May 10, 1988, based on the record consisting of the undisputed portions of the petitions of Cahill and the Attorney General and the affidavits submitted by the PSC and the utilities, the trial court annulled the PSC policy. (A23-27) On June 1, 1989, the

Appellate Division unanimously affirmed the trial court's decision. (A16-22)

Two of the utility respondents, N.Y. Telephone and Rochester Gas and Electric Corporation, then appealed to the New York State Court of Appeals. The PSC, however, did not appeal. (A3) Nor did the PSC seek a stay of the decision annulling its policy. Instead, the PSC responded to the court's decision by abandoning the challenged policy in a series of decisions that (1) required the utilities involved in this litigation to defer revenues associated with allowances for charitable contributions and offset those deferrals against future rate awards, and (2) reflected the new policy with respect to other utilities in the next rate case for each company. PSC Opinion in Case No.

29119 (September 25, 1989); PSC Opinion No. 89-34 in Case No. 88-G-229 (October 13, 1989); PSC Opinion No. 89-38 in Case No. 88-G-226 (October 26, 1989).

The decision by the PSC to abandon its policy was explicit:

> We have recently revisited our policy concerning charitable contributions. We ended the allowance of charitable contributions, by means of a deferral of revenues, for the companies involved in the Cahill litigation.

PSC Opinion No. 89-34 in Case No. 88-G229 (October 13, 1989) (emphasis added).

The PSC decided to abandon the policy over the dissenting opinion of one commissioner who believed that "[t]here should be no change in this Commission's policy until a final judicial determination of this is made." PSC Opinion in Case No. 29119 (September 25, 1989) (dissenting

opinion at 2). Thus, by the time the case reached the court below, the PSC had ceased to defend its own policy, and the only representative of the State of New York remaining in the case was the Attorney General, who was continuing to challenge the now-abandoned policy and who opposes the grant of certiorari by a separate Memorandum Opposing Certiorari filed today.

On May 10, 1990, the Court of Appeals affirmed the decision of the lower court. (A1-15) The present petition for a writ of certiorari followed.

SUMMARY OF ARGUMENT

When the PSC elected to "revisit" and terminate its policy, the Article III case or controversy between the parties ended. Under current PSC policy, petitioners cannot charge

ratepayers for their charitable contributions. It is thus entirely speculative whether a decision by this Court favorable to the petitioners would actually benefit them. Therefore, this Court does not have jurisdiction to grant the petition.

In any event, there is no basis for the Court to grant review of this case. Petitioners have not cited a single case whose holding conflicts with the holding of the court below. The New York Court of Appeals was correct in finding that the PSC's decision to force ratepayers to finance the charitable contributions of monopoly utilities constituted state action and violated the First Amendment. Moreover, precedents such as Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977), require that strict

scrutiny be applied to any scheme which requires an individual to finance the speech of another, a test under which, the Court of Appeals correctly found, the PSC policy clearly failed.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CASE OR CONTROVERSY.*

The decision by the PSC to abandon the challenged policy, ended the Article III controversy between the parties. Cahill's challenge was specifically to the PSC policy,

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* Respondent Cahill did not make this argument in the court below because the New York Court of Appeals, unlike this Court, has jurisdiction to consider "significant or important questions not previously passed upon" even where the case has become moot and no case or

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adopted in 1970, under which the PSC includes as operating expenses to be considered in setting just and reasonable rates, charitable contributions of utilities. (A61-64)

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controversy currently exists. Hearst Corp. v. Clyne, 431 N.Y.S.2d 400 (1980). The fact that a state court issues a ruling on a matter of federal constitutional law, however, does not confer jurisdiction on this Court where no case or controversy exists:

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such.

Doremus v. Board of Educ., 342 U.S. 429, 434 (1952).

Indeed, Cahill's action was initially filed only against the PSC and its Commissioners, with the utilities subsequently added as parties. (A55-56)

Since the PSC decided last September to abandon the challenged policy (over the dissent of one Commissioner) there is no controversy between the remaining parties. Even if this Court were to grant certiorari and were to decide that the New York Court of Appeals had erred, petitioners still could not charge their ratepayers for their charitable contributions. Given that (1) the PSC elected not to appeal the Appellate Division's decision but to "revisit" and abandon the policy over the dissent of a Commissioner, (2) the membership of the PSC changes on a regular basis, and (3) a decision by

the PSC to reinstate the charitable contribution recoupment policy would certainly face new challenges under the New York State Constitution and statutory law, any suggestion that a decision in favor of the petitioners would result in reinstatement of the policy by the PSC would be entirely speculative. Such speculation that a favorable ruling might benefit a litigant cannot create a case or controversy, where one does not presently exist.

Thus, in Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26 (1976), several indigents and groups composed of indigents sued the Secretary of the Treasury and the Commissioner of the IRS asserting that the IRS had violated the IRS Code and the Administrative Procedure Act by

granting tax exempt status under 28 USC §501(c)(3) to hospitals that offered to indigents only emergency-room services. Plaintiffs' theory was that they had been injured by the IRS's action because if the IRS had complied with the law and denied tax-exempt status to such hospitals, such hospitals would have been discouraged from denying their services to the plaintiffs. In holding that no case or controversy existed between the parties, this Court found it

> speculative whether the desired exercise of the court's remedial powers would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forgo favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.

426 U.S. at 43. Such "unadorned speculation will not suffice to invoke the federal judicial power." Id. at 44.

Similarly, in Allen v. Wright, 468 U.S. 737, reh. denied, 468 U.S. 1250 (1984), the parents of black public school children sued the Secretary of the Treasury and the Commissioner of the IRS, alleging that the IRS was unlawfully granting tax-exempt status to private schools that discriminated on the basis of race. Plaintiffs' theory was that the IRS's conduct would "facilitate the raising of funds to organize new schools and expand existing schools in order to accommodate white students avoiding attendance in desegregating public school districts", thus injuring the ability of plaintiffs' children to

attend desegregated public schools. 468 U.S. at 746.

In holding that no case or controversy existed between the parties, the Court found the claimed injury to be as speculative as in the Simon case. 468 U.S. at 759. It was speculative whether (1) a change in the IRS policy would affect the policies of any private school, (2) the change in the policy of any school would affect the decision of any parent whether to send a child there, and (3) "in a particular community, a large enough number of the numerous relevant school officials and parents would reach decisions that collectively would have a significant impact on the racial composition of the public schools." 468 U.S. at 758. Because the plaintiffs had not shown that they

stood "to profit in some personal interest" by a favorable decision, they had not met the "fundamental requirement" of Article Three of the Constitution. 468 U.S. at 766.

Petitioners here are just like the plaintiffs in the Allen and Simon cases. Although they disagree with the decision below, their quarrel is no longer with the state courts or even with Mr. Cahill. Rather, it is with the PSC, which elected to abandon its policy. Petitioners' suggestion that they will actually benefit by a favorable ruling from this Court is thus "unadorned speculation," which is dependent on predicting future actions by the PSC.

A case almost identical to the case at bar is Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

In Bender, a local school board had prohibited a religious student group from meeting in a public school on Establishment Clause grounds. Ten students sued the school board, and the district court ruled that the school board had violated the free speech rights of the students. Rather than seek a stay or appeal, the school board responded by voting 8-1 to revise its policy and allow the student group to meet. The dissenting school board member then appealed to the court of appeals, which reversed, holding that the Establishment Clause barred the group from meeting.

After granting the students' petition for certiorari, this Court reversed, holding that the court of appeals had not had jurisdiction to hear the dissenting school board

member's appeal, either in his official capacity or in his individual capacity as the parent of a student. 475 U.S. at 548-49. As Justice Marshall explained in his concurring opinion:

> That controversy [between the students and the school board] ended with the entry of the District Court judgment; the School Board voting 8-1 with Mr. Youngman in the minority, abandoned its earlier position and agreed to allow plaintiffs to conduct the prayer group activities they sought. There was therefore nothing left to litigate between those parties.

475 U.S. at 549.

In the same way, the controversy between the parties in this lawsuit ended when the PSC voted to abandon its policy*.

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* It would be different were petitioners to argue that they had

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II. IN ANY EVENT, PETITIONERS HAVE NOT SET FORTH ANY BASIS FOR THIS COURT TO GRANT REVIEW.

Even if petitioners could show that a case or controversy exists and that this Court therefore has jurisdiction to grant their petition for a writ of certiorari, they have not demonstrated the "special and important reasons" that would justify the

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* a constitutional right to charge ratepayers for their charitable contributions, an argument which they do not make. In that case, they could institute a proceeding against the PSC, not a party here and would have independent standing to defend their own constitutional rights. Moreover, in that case, a favorable decision by this Court would result in the reinstatement of the recoupment policy, and thus the benefit to petitioners of a favorable ruling would not be speculative.

granting of the writ. Sup. Ct. R. 10.1. The decision of the New York Court of Appeals, striking down a policy of a New York State agency, put it in line with the vast majority of state supreme courts that have considered such forced charitable contribution schemes. Moreover, petitioners have cited no decision of any state or federal court in which the constitutional issues presented here were considered and decided in conflict with the decision below. The decision below is entirely consistent with this Court's precedents regarding state action and compelled speech.

A. THE PSC POLICY CONSTITUTED STATE ACTION.

The court below correctly identified the "critical issue" as

whether this case involves the "private conduct of a utility in which the state has merely acquiesced" or "governmental conduct of an agency of the state itself." (A31) In finding the latter, the court pointed out that Cahill was not challenging the decision of the utilities to make charitable contributions, but rather the decision of the PSC to force utility customers to pay for them. (A32) This coercion results from the fact that it is

> the State [that] establishes the rate that the customer must pay and the rate includes an allowance for the objected to contributions. Because the utility is a monopoly the customer must pay or be deprived of his right to utility service.

(A32) In finding state action, the court below relied on the "broad grant of rate-setting authority vested in the PSC by the Legislature" (A35),

including its "exclusive authority to determine just and reasonable rates." (A33) "[N]o utility may charge more or less than the rates established by the PSC" (A33), and "the customer must pay or be deprived of his right to utility service." (A32)

As the court below found, this case is thus completely distinguishable from Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), and Blum v. Yaretsky, 457 U.S. 991 (1982). (A34) In Jackson, the plaintiff was a utility customer who filed a lawsuit against a utility, not the utility commission, challenging the utility's decision to terminate service for non-payment of a bill. The state action that was alleged was the fact that the utility's tariff that had been approved by the

Public Utility Commission had included a provision stating the utility's right to terminate service for non-payment. This Court found that such a provision had routinely appeared in the utility's previously filed tariffs for many years, had never actually been considered by the commission, and had automatically become effective 60 days after filing when not disapproved by the commission. 419 U.S. at 354-55. Furthermore, this Court found that it was not even clear under state law whether the utility was even required to file this provision as part of its tariff or whether the commission would have had the power to disapprove it. Id. at 355. Under these circumstances, the Court found that the utility's decision to terminate service did not

constitute state action.

In Blum, the plaintiffs challenged the decisions of private nursing homes to transfer patients. There were no state regulations authorizing the transfers, and thus no state regulatiions to challenge. Instead, the plaintiffs sought an injunction requiring the state "to adopt regulations that will prohibit the private conduct of which they complain." Blum, 457 U.S. at 1003. The Court found that the private decisions of the nursing home operators were not converted into state action by the state's non-action.

Those cases stand in marked contrast to the case at bar, where what is being challenged is the decision by the PSC to include in the rates that it

has the exclusive authority to set the cost of the charitable contributions of public utility monopolies. This was a publicly announced policy of the PSC which, in 1970, represented a reversal of its longstanding policy to exclude such contributions as operating costs. Thus, the court below rejected petitioners' suggestion that the role of the PSC consituted the "passive acquiescence" that was found not to constitute state action in the Jackson and Blum cases. (A34-35)*

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* Petitioners' suggestion that since "corporations routinely make charitable contributions," the PSC did not allow petitioners to do anything that they would not otherwise have done (Pet. at 13),

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Since it is the PSC's policy that compels Cahill to subsidize the charitable contributions of monopoly utilities, "the cause of power and authority by which respondent's rights are lost or sacrificed, is the governmental action on which the Constitution operates." Railway Employees' Dep't v. Hanson, 351 U.S.

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* is misleading. It ignores the fact that the customers of utility monopolists have no choice but to pay for such contributions or be deprived of service. (A32) Private corporations cannot make charitable contributions without taking into account the effect of such contributions both on their profitability and on the attitudes of their customers, who have the choice not to patronize a corporation whose charitable contributions they find offensive. Through their monopoly status and the setting of their rates by the PSC, public utilities are protected from those market forces.

225, 232 (1956).

Accordingly, the court below properly concluded that the PSC's policy represented state action.*

B. THE PSC POLICY VIOLATED THE FIRST AMENDMENT.

The court below correctly found that the compelling state interest test was applicable to the PSC's charitable contribution recoupment policy (A7-8), and that the

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* Petitioners argue that for case or controversey purposes they should be viewed as the legal alter egos of the PSC, but for the purposes of the merits they should be viewed as purely private actors free from the constraints of the First Amendment. Obviously, petitioners cannot have it both ways. If they are to be treated as stand-ins for the PSC, then state action is clearly present. If they are to be treated as purely private entities, then the failure of the PSC to have appealed destroys any vestige of an Artice III case or controversy.

purported state interests tendered by petitioners could not satify that test. (A8-9) That decision was entirely consistent with the precedents of this Court such as Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Ellis v. Brotherhood of Ry. Airline and Steamship Clerks, 466 U.S. 435 (1984), and Keller v. State Bar, 110 S.Ct 2228 (1990), which require exacting scrutiny of any scheme in which individuals are required to finance the speech of others. Cf. Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990) ("the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to [its] political message") (Brennan, J., concurring). In striking down the PSC policy, the court below invoked Thomas

Jefferson's "ringing alarm," invoked by this Court in Abood, that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." (A5)

In an attempt to distinguish this case from the precedents cited above, petitioners argue the novel theory that one's speech and associational rights under the First Amendment are abridged by a scheme in which one is forced to fund the speech of another only if one is publicly identified with that speech. (Pet. at 18) There is no case, however, that so limits one's freedom from compelled speech and association, and petitioners cite none. To the contrary, the cases cited above make clear that it is compulsion to fund speech with which

one disagrees that violates the First Amendment regardless of whether one will be identified with it.

Thus, in Abood, the plaintiffs were employees who were not members of a union, but were required under an "agency shop" agreement to pay to the union a service fee equal to union dues. As non-members, the plaintiffs would not be associated with the speech of the union. And yet, by upholding the "agency shop" agreement in Abood, this Court found that it had "countenanced a significant impingement of First Amendment rights," not because the dissenting employee would be associated with the views of the union, but because the employee "is forced to support financially an organization with whose principles and demands he

may disagree." Ellis, 466 U.S. at 455-56. In Abood, the Court stated clearly that First Amendment principles "prohibit [the union] from requiring any of the appellants to contribute to the support of an ideological cause he may oppose." 431 U.S. at 235 (emphasis added). And, to the extent the Court viewed the right in question as one of association, the Court clearly considered associational rights to be impaired by the coerced funding itself without regard to the question of public identification:

> To be required to finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for advancement of ideas, or to refrain from doing so, as he sees fit.

Abood, 431 U.S. at 222 (emphasis added).

The Court in Chicago Teachers Union v. Hudson, 475 U.S. 292 (1986), reiterated that it was the "compulsory subsidization of ideological activity" that was condemned in Abood, because of "the tyrannical character of forcing an individual to contribute even 'three pence' for the propogation of opinions which he disbelieves.'" 475 U.S. at 302, 305 (emphasis added). This principle was reiterated by the Court just last term in Keller v. State Bar, 110 L.Ed.2d at 11.* Thus,

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* The conclusion of the court below is identical to that of the members of this Court who have already addressed the precise question presented by this petition. Thus, in Consolidated Edison Co. v. PSC, 447 U.S. 530 (1985), this Court considered a PSC ban on the

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petitioners' attempt to limit the

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* inclusion by utilities of informational inserts on controversial public policy issues in their billing envelopes. This Court struck down the ban on First Amendment grounds, reasoning that the PSC had not demonstrated that it could not allocate the costs of inserts to the utility's shareholders (rather than to the ratepayers who could properly be charged for the bills themselves). The Court expressly declined to decide whether the rule of Abood would prohibit the PSC from passing on to ratepayers the cost of the inserts.

However, in the dissenting opinion, Justice Blackmun, joined in relevant part by (then) Justice Rehnquist, reached out to decide the question left open by the majority, holding the rule of Abood fully applicable to the present issue:

> If the State compelled an individual to help defray the utility's speech expenses, that compulsion surely would violate that person's First and Fourteenth Amendment rights....

447 U.S. at 552 (citations omitted).

holding of Abood and its progeny to cases of public identification is wholly without merit.

Similarly without merit is petitioners' protest of the supposedly dire implications of the decision of the court below (Pet. at 25-28), which simply placed the State of New York in line with almost every other state whose courts have considered such forced contribution schemes. Contrary to petitioners' claim (at 25), the holding of the court below casts no doubt whatever on the right of the government to spend tax revenues as it sees fit. As explained by Justice Powell in Abood:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state

> interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people. The same cannot be said of a union....*

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* Abood, 431 U.S. at 259 n.13 (Powell, J., concurring).

Or of a telephone company. The court below recognized this fundamental distinction. (A9-10)*

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* The Court has granted certiorari in Lehnert v. Ferris Faculty Assoc., No. 89-1217. Significantly, both parties in Lehnert acknowledge that, even where there is a sufficient state interest to warrant compulsory subsidization of a union by non-member employees, the permissible compulsory subsidization is limited to the core functions of the union. Neither side even suggests that employees could be forced to fund functions as tangential to the union's core function as charitable contributions.

Contrary to petitioners' contention (at 15), the PSC has never made a finding that there is any connection whatever between charitable contributions and the "efficient operation" of utilities, and based its 1970 policy instead on a desire to benefit charities. See supra, at 2. Only the petitioners have alleged such a connection, and the court below found that allegation to be "at best speculative." (A9)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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